

THE BANKRUPTCY OF PERSONAL GUARANTOR'S HEIRS UNDER INDONESIA LEGAL SYSTEM

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ABSTRACT

The great advance of today's business is certainly supported by the existence of banks loan facility. However, banks will not easily grant the loans to just anybody since there would be a probability that banks meet with the default risk. To reduce the impact of the risk, they require a guarantee. For banks, the guarantee shall legally provide them a protection, security and certainty in getting their loan repayment. As a common form, banks usually ask for property as collateral, but sometimes banks meet difficulty to execute it. Hence, nowadays, the banks will also ask for a personal guarantee. Personal guarantee is an agreement in which a third party agrees to fulfill the obligation of the debtor if debtor himself fail to do so. The personal guarantor has big responsibilities, even into the realm of bankruptcy. Even though a personal guarantor is not a debtor, a creditor may file him a bankruptcy petition to the Commercial Court if he meets the bankruptcy requirement. Problems then arise when a personal guarantor dies and it causes the creditors to lose a person who guarantees the debtor's obligation. This research tackles with the problems by using a normative juridical approach with descriptive analysis of secondary data which consist of primary law materials and secondary law materials. The study shows that the death of personal guarantor causes the rights and obligations of personal guarantor upon the agreement are passed to his heirs. Consequently, his heirs as the party who do not involve in the loan agreement and the personal guarantee agreement may be filed the bankruptcy petition by the creditor as it is usually filed to the personal guarantor.

Keywords: heirs, bankruptcy, personal guarantor

INTRODUCTION

In the business world, companies are in need of funds to finance their business operation. The most selected preference in obtaining loans is the one provided by banks. As it is known, the main business of banking is loans facility, and giving loans actually has a very high risk if the loans that has matured are not paid by the debtor because of his negligence or inability to pay.

In order to reduce the impact of the risk, banks usually require a guarantee. For banks, guarantee has a function to provide coverage to the debt, therefore guarantee shall legally provide them a protection and certainty in getting their loan repayment (the law concerning banking says that guarantee is only an ingredient in credit analysis / The 5 C's Analysis). Based on its object, there are two types of security rights under Indonesian law, which are real (property) security rights and personal security rights, in which both of them shall provide coverage to the debt. As a common form, banks usually require a property as collateral, also referred to as real security rights, but sometimes banks meet difficulty to execute it. Hence, the banks will also ask for a personal security rights in the form of personal guarantee agreement or *borgtocht*.

Article 1820 of the Indonesian Civil Code (*Burgelijk Wetboek*) states that a personal guarantee agreement is an agreement in which a third party agrees, for the benefit of creditors, to fulfill the obligation of the debtor, if he himself fails to fulfill these. Thus, if the debtor cannot pay his debts to creditors, there is a third party who will pay those debt to the creditors. A personal guarantee agreement conducted by legal entities referred to as a corporate guarantor while guarantor performed by individual commonly referred to as a personal guarantor.(Sjahdeini, 2010)

It often happens that a person who wants to bind himself as a personal guarantor assume that a personal guarantee agreement was conducted only to strengthen the creditworthiness, whereas, in certain conditions, it may bring a big legal consequence, even to the realm of bankruptcy. In bankruptcy, the debtor may be filed with bankruptcy petition if he meets with the requirements, which are having two or more creditors and failing to pay at least one debt which has matured and become payable (Indonesia, 2004). Although a party that may be declared bankrupt is the one who serves as a debtor, the personal guarantor may also be declared bankrupt because in some condition he may be domiciled as

a debtor. In the personal guarantee agreement, if the debtor does not fulfill his obligations to pay the debt, then the obligation to pay the debt will belong to the personal guarantor. Therefore, the personal guarantor is also a debtor who obliges to pay the debt of debtor to the creditor if the debtor himself fails to do it. So, since the guarantor is a debtor as well, therefore the personal guarantor may be declared bankrupt under the law number 37 of 2004 concerning Bankruptcy and Suspension of Obligation For Payment of Debts (Indonesian Bankruptcy Law). (Sjahdeini, 2010)

Problems then arise when a person who acts as a personal guarantor dies while the personal guarantee agreement is still valid. Article 1826 of the Indonesian Civil Code states that the contracts concluded by guarantors shall be succeeded to their heirs. Consequently, all the rights and obligations of personal guarantor will be passed to his heirs and in return, the heirs of personal guarantor will shoulder all responsibilities as a personal guarantor such as paying debt of the debtor if debtor himself fails to do so. Moreover, the heirs of personal guarantor may also face legal consequences as a personal guarantor, such as being filed with bankruptcy petition. The bankruptcy petition against the heirs of personal guarantor has occurred in Indonesia, which is in the case number 02/Pdt.Sus.Pailit/2014/PN.Niaga.Mks in which Greenfinch Premier Fund (creditor) filed a bankruptcy petition against PT Henrison Iriana (debtor), as well as against the heirs of Andi Sutanto (personal guarantor) and the heirs of Gunawan Sutanto (personal guarantor). In this case, the Commercial Court declared bankruptcy to both the debtor and the heirs of personal guarantor.

Based on the description of background above, the subject matter to be discussed in this paper is: How is a bankruptcy petition against the heirs of a personal guarantor be filed considering the provisions of inheritance legal system in Indonesia is still pluralism?

OVERVIEW OF THEORETICAL

In giving loans facility, banks always do a credit analysis in an effort to fulfill aspects of banking carefulness principles. The 5 C's analysis is actually one of the banking analysis system required by Article 8 of Law Number 7 of 1992 as amended by Law Number 10 of 1998 on Banking. According to this provision concerning the application of the 5 C's (character, capacity, capital, collateral, condition of economy), the matter which has preventive protection against loan repayment is an element of collateral guarantees.

For some decades, an element of collateral considered to obstruct the economy development, since the Article 24 of Law Number 14 of 1967 on Banking stated that banks do not give unsecured loans to anybody. It is then interpreted that the loans would not be given without any guarantee, especially real security rights, to secure the loans. The explanation of Article 8 of Law Number 7 of 1992 jo. Law Number 10 of 1998, states that if the other elements of 5 C's have convinced the bank, then guarantees is sufficient in the form of principal guarantee only. Hence, since 1992, the element of collateral is never be really calculated, especially in lending on a large scale, while it is still applied for medium-scale account.

By law, guarantee has a function to provide coverage to the debt. For banks as creditors, a guarantee will become something in hand that can be enforced if a debtor fails to fulfill his obligation under the loan agreement. The more guarantee that creditors can take from a debtor, the risks of the loan will be considered lower. Meanwhile, for debtor, if they can give more guarantee to creditors, then it will enhance its creditworthiness. As it is said before, based on its objects, the Indonesian Civil Code classified security rights into real (property) security rights and personal security rights. Both types of security rights has a function to coverage the debt of debtors.

Real security rights are absolute rights with the following characteristics: (i) they pertain only to specific property or goods of a debtor, (ii) they can be exercised against any parties, and (iii) they generally follow the encumbered goods to whomsoever such goods may thereafter belong (Hasbullah, 2009). According to that, a real security means there is a specific property or goods that are granted as security and such property or goods can be exercised by creditor if the debtor fails to repay the loans. A real security provides a special position to the creditors, in which the creditors have preference rights, namely the right to take precedence over other creditors in getting debt repayment from objects that become a guarantee. Based on Indonesian Security Law, real security rights holder is a creditor whose loans are secured by Hak Tanggungan, pledge, fiduciary security, and hypothec. Those creditors are referred to as a secured creditors. In a condition in which secured creditors has bankrupt debtor, they can exercise the object of guarantee as if the bankruptcy does not happen to debtor. The provision regarding the legal position of the secured creditors regulated in the Article 56 of Indonesian Bankruptcy Law.

A personal security rights are rights which establish a direct relationship with a specific person/corporate body and therefore can only be exercised against such person/corporate body and his/its assets in general. This security rights arises

from an agreement between the creditor and a third party, in which conducted for the benefit of the debtor. The third party in such agreement guarantees the fulfillment of obligations of the debtor, even such agreement can be conducted without the knowledge of the debtor. In a personal security rights, there is no specific objects that are bound in the agreement, however thing that is tied in the agreement is the ability of third party to fulfill the obligations of the debtor. Since there is no specific object as guarantee, the provisions of the general security (*jaminan umum*) under Article 1131 and Article 1132 of the Indonesian Civil Code will be applied when the debtor is in defaults.

In the event of bankruptcy to a debtor, it will apply the principle of *paritas creditorum*, which means that all creditors have an equal right to debt repayment and that the proceeds of the bankrupt's estate shall be distributed in proportion to the size of their claims. Thus, in this event, similar to the holder of a general security, creditors with a personal security rights will be referred to as unsecured creditors, so they will not have priority over other creditors in getting debt repayment.

A personal guarantee agreement or *borgtocht* is one of the type of personal security rights that has a direct relationship to the particular individual and can only be defended to a particular debtor and to the debtor's wealth in the generally (Sofwan, 1980). Article 1820 of the Indonesian Civil Code states that a personal guarantee agreement is an agreement in which a third party agrees, for the benefit of creditors, to fulfill the obligation of the debtor, if debtor himself fails to fulfill these. This provision indicates that personal guarantee agreement is an ancillary agreement (*accessoir*), which means its existence and validity of the agreement depend on the existence and validity of the principal agreement in consideration of which the guarantee is given. This is related to the purpose and content of the personal guarantee agreement, which is a guarantee to fulfill the obligations upon principal agreement (Sofwan, 1980). Moreover, in terms of the fulfillment of obligations, a personal guarantee agreement has a character of *subsidiar* (Sofwan, 1980). This means that the first-time fulfillment of obligations of the debtor is shouldered by the debtor himself and the personal guarantor is only a "subsidiary" or "reserve" if the debtor cannot fulfill his obligations (Sjahdeini, 2010).

In Indonesia, provisions regarding bankruptcy is regulated in Law Number 37 of 2004 concerning Bankruptcy and Suspension of Obligation For Payment of Debts (Indonesian Bankruptcy Law). Bankruptcy is general confiscation of all assets of a bankrupt debtor that will be managed and liquidated by a curator under the supervision of supervisory judge as provided for herein (Indonesia, 2004). According to Munir Fuady, bankruptcy is a general confiscation of all property of the debtor so that the peace can be reached between the debtor and the

creditors or that such property can be divided equally among the creditors (Munir, 2002).

According to Article 2, paragraph (1) Indonesian Bankruptcy Law, a person (individual or legal entity) may be declared bankrupt if he meets the requirements, which are a debtor that has at least two or more creditors, a debtor that does not pay off at least one of his debt to one of its creditors, and such debt is matured and become payable. In addition, Article 8 paragraph (4) of Indonesian Bankruptcy Law also stated that a bankruptcy petition must be granted if there are facts or circumstances which simply proving that the requirements for a declaration of bankruptcy as stipulated in Article 2 paragraph (1) Indonesian Bankruptcy Law have been met. Furthermore, fact or condition that requires simple substantiation means the fact that there is an existence of two or more creditors of the debtor filed for bankruptcy and an existence of a debt that has matured and become payable (Indonesia, 2004).

In bankruptcy, a party who may be filed with bankruptcy petition is the one who serves as a debtor, namely those who have debts, because of agreements or legislation that its repayment can be charged in court (Indonesia, 2004). Based on Article 1 point (6) Indonesian Bankruptcy Law, a definition of debt itself has been interpreted very widely, which covers every kind of obligation of debtor. A debt in the law of contract refer to obligations that must be fulfilled by the debtor in a contract, arising from agreements and legislation (Hoff, 2000). This shows that the definition of debt is not only limited to payment of a sum of money, but also includes other obligations. These obligations is a debt which gives creditors a right to charge.

Furthermore, a failure of the debtor to fulfill his obligations may become a basis for the filing of a bankruptcy petition (Hoff, 2000). In bankruptcy, a personal guarantor is also a debtor that bound to pay debt of debtor to creditor or creditors if debtor fail to pay his debt that is matured and payable. Since a personal guarantor is a debtor, a personal guarantor may be declared bankrupt under Indonesian Bankruptcy Law (Sjahdeini, 2010).

RESEARCH METHODS

The approach used in this study is normative juridical, which means that research is concluded with reference to legal principles and legal norms contained in legislation, court decisions and norms that live and thrive in the community. Judging from its character, this paper is a descriptive study that reveals the legislation relating to the legal theories that become the object in the research (Ali, 2009). Data that is used in this research is secondary data consists of primary legal materials in the form of legislation and secondary legal materials in the form of books or literature. Data collection tool that is used is the

document study. Moreover, data analysis methods of this research is qualitative method. Qualitative research is a research related to ideas, perceptions, opinions, beliefs of people who will be examined and all of it cannot be measured by numbers (Sulistyo, 2006).

DISCUSSION

Article 1826 of Indonesian Civil Code states that contract concluded by personal guarantor will be passed to his heirs. According to this provision, basically, the heirs of personal guarantor will replace the position of the deceased personal guarantor's and will obtain an obligation to pay the debt of debtor if the debtor is in defaults. Moreover, if they do not fulfill their obligations as personal guarantor, they may be sued to court by creditors or as a matter of fact, they may be filed with a bankruptcy petition by creditors as long as they meet bankruptcy requirements stipulated in Article 2 paragraph (1) Indonesian Bankruptcy Law. A bankruptcy to heirs of personal guarantor will cause them to lose their rights to control and manage their assets (Indonesia, 2004), which means they cannot perform any legal act of the wealth that has been declared bankrupt (bankruptcy assets).

In order to determine whether the heirs of personal guarantor may be filed with a bankruptcy petition, we shall consider their responsibility to the obligation left by former personal guarantor in the field of wealth, which then has to be considered based on the inheritance legal system in Indonesia and the inheritance legal system adopted by the heirs. In Indonesia, the provisions regarding inheritance law is still a pluralism which are West Inheritance Law, Islamic Inheritance Law and Adat Inheritance Law.

West Inheritance Law is a set of rules governing wealth of dead person, which concerns about the transfer of wealth left by deceased person and the legal consequences of this transfer for those who accept it, either in the relationship between them and between them and a third party (Pitlo, 1979). In West Inheritance Law, the deceased person will transfer his wealth that includes rights (assets) and obligations (liabilities) in the field of wealth. So, an inheritance consist not only in the form of material rights but also in the form of bills or receivables and may also be an amount of debt involving a third party (individual rights) (van Apeldoorn, Sadino, & Supomo, 1978). Hence, the heirs who are subject to West Inheritance Law are not obliged to accept such inheritance left by the deceased person (Zainuddin, 2008). Therefore, they have an opportunity to think and determine their attitude towards the

inheritance left by the deceased person, such as accepting the inheritance, accepting the inheritance conditionally, or declining the inheritance.

If the heirs accept the inheritance, it means they will obtain all the rights and obligations of deceased person. Furthermore, they will take full responsibility for the obligations left by deceased person. Thus, the heirs of personal guarantor who accept the inheritance left by personal guarantor, will obtain all the rights and obligations upon personal guarantee agreement as a personal guarantor, including receiving an obligation to pay debt of the debtor to the creditor with all his wealth if the debtor fails to pay.

If the heirs accept the inheritance conditionally (*beneficiair*), it means they will obtain all the rights and obligations of deceased person, but they are only responsible to the extent of the amount of inheritance they received. Thus, the heirs of personal guarantor who accept the inheritance left by personal guarantor conditionally, will obtain all the rights and obligations upon personal guarantee agreement as a personal guarantor, including obtaining an obligation to pay debt of the debtor to the creditor limitedly if the debtor fails to pay

If the heirs decline the inheritance, they will never be considered as heirs of the deceased person. It means that there is no transfer of rights and obligations of the deceased person to his heirs and, in return, the heirs of personal guarantor will not obtain any kind of rights and obligations of the deceased person. Thus, the heirs of personal guarantor who decline the inheritance left by personal guarantor, will not obtain any kind of rights and obligations upon personal guarantee agreement and they are not obliged to pay debt of debtor if the debtor himself fails to do so.

Meanwhile, in the case of the heirs who are subject to the Islamic Inheritance Law, the heirs has an obligation to pay debts left by the deceased person. In Islamic Inheritance Law, the deceased person will transfer an inheritance, not in the terms of assets and liabilities, but which has been cleared of various obligations under the terms of religions, debts and testament of the deceased person (Hadikusuma, 1991). According to that, debt repayment is the first thing that should be handled when someone dies. Article 175 paragraph (2) Compilation of Islamic Law states that the responsibility of the heirs toward debt or liability of the deceased person only to the extent of the amount of inheritance So, if the inheritance is not enough to pay the debts, the heirs will have no legal obligation to pay the rest of debt, unless the payment brings no harm or loss to the heirs (Ramulyo, 2004).

However, in the life of society, the heirs will endeavor to resolve all outstanding debts even though the inheritance left behind is not enough. This occurs because Muslims generally believe that paying off debts of the deceased person is a primary obligation, in order to liberate accountability of the deceased person in the afterlife and to reveal matters that limits him to reach the heaven. In other words, paying off such debt become a moral obligation for the heirs. The same thing also stated by K.H. Maftuh Kholil, Chairman of Bidang Fatwa Majelis Ulama Indonesia Kotamadya Daerah Tingkat II Bandung, that says the heirs of deceased person who left debt have automatically an obligation to repay the debt until it is paid off. Thus, the heirs of a personal guarantor who are subject to the Islamic Inheritance Law have a duty to fulfill the obligations of the deceased person as personal guarantor, which is paying the debt of debtor to the creditor when the debtor is in defaults.

Beside West Inheritance Law and Islamic Inheritance Law, there is one more type of inheritance legal system in Indonesia, which is Adat Inheritance Law. According to Supomo, Adat Inheritance Law is a set of rules governing the process and transfer of properties and intangible objects from one generation of people to its descendant (Soekanto & Soekanto, 1996). Based on Adat Inheritance Law, inheritance defines as assets left by a deceased person to his heirs which not only in the form of tangible objects but also in the form of intangible objects, such as the position / post custom, the responsibility of family / kinship (Hadikusuma, 1991), and the debt that hasn't been paid off by the deceased person during his life (Soekanto & Soekanto, 1996).

The obligation to pay debts of deceased person is, in fact, a part of the inheritance, even as a negative part (Haar, 1986). At this moment, the Adat Inheritance Law in each region in Indonesia has different kind of rules. It is influenced by the kinship system adopted by and which are located within Indonesian society, which divided into patrilineal system, matrilineal, or bilateral parental system. In Tapanuli (Batak), Kalimantan (Dayak) and Bali, the heirs have an obligation to pay the debt as long as the lenders notify their right to the heirs (Soekanto & Soekanto, 1996).

As it can be concluded, the heirs of the personal guarantor who are subject to Islamic Inheritance Law, Adat Inheritance Law and Western Inheritance Law, especially who accept the inheritance, have responsibility to fulfill the obligations of deceased person and may face legal consequences as a personal guarantor, which is bankruptcy declaration to themselves. On the contrary, the heirs who are subject Western Inheritance Law, especially who decline the

inheritance, have no such responsibility and they may not face those legal consequences.

For example, in the case in which Greenfich Premier Fund (Bankruptcy Petitioner) filed a bankruptcy petition against PT Henrison Iriana as the principal debtor (Bankruptcy Petitionee I), the heirs of the deceased personal guarantor, named Andi Sutanto, (Bankruptcy Petitionee II) and the heirs of the deceased personal guarantor, named Gunawan Sutanto (Bankruptcy Petitionee III). This case began when the Bankruptcy Petitionee I concluded a credit agreement with Bank Pembangunan Indonesia in 1988 in order to finance his construction of an integrated plywood factory. Then, Bank Pembangunan Indonesia traded its receivable account toward Bankruptcy Petitionee I and such receivable was purchased by Bankruptcy Petitioner the last time. In return, it caused Bankruptcy Petitioner to be a creditor of Bankruptcy Petitionee I. In addition, Bankruptcy Petitionee I also concluded a credit agreement with Nissho Iwal Corporation (NIOA). Then, NIOA's receivable account toward Bankruptcy Petitionee I was bought by Vendome Investment Holding Ltd. Both of these agreements were attached with personal security rights in the form of personal guarantor in which Gunawan Sutanto and Andi Sutanto bind themselves as personal guarantors.

The debts of Bankruptcy Petitionee I, both to Bankruptcy Petitioner and Vendome Investment Holding Ltd. has matured on July 24th 2014 and July 28th 2014, but Bankruptcy Petitionee I have not paid off the debts. Meanwhile, in 2014, both personal guarantor which are Andi Sutanto and Gunawan Sutanto have been died. Nevertheless, the death of personal guarantors did not cause the lender, in this case are Bankruptcy Petitioner and Vendome Investment Holding Ltd, to lose his right to get a debt repayment if the debtor's in defaults, since Article 1826 of Indonesian Civil Code states that the contract concluded by guarantor will be passed to his heirs. Thus, the death of Andi Sutanto as personal guarantor will cause Petitionee Bankrupt II, the heirs of Andi Sutanto, to receive all the rights and shoulder all the obligations of personal guarantor. The same goes to Bankruptcy Petitionee III as the heirs of Gunawan Sutanto, they will receive all the rights and bear all the obligations of a personal guarantor.

Bankruptcy Petitioner and Vendome Investment Holding Ltd. then used this provision as a legal basis to collect debts payment of Bankruptcy Petitionee I to Bankruptcy Petitionee II and Bankruptcy Petitionee III. However, both Bankruptcy Petitionee II and Bankruptcy Petitionee III did not fulfill their obligation to pay off the debt. As a last attempt, the Bankruptcy Petitioner file a bankruptcy petition against

Bankruptcy Petitionee I, Bankruptcy Petitionee II and Bankruptcy Petitionee III

In the decision of this case, the judges said that according to Article 1826 of the Indonesian Civil Code, the death of Andi Sutanto and Gunawan Sutanto as personal guarantors causes each of Bankruptcy Petitionee II and Bankruptcy Petitionee III as the heirs of the deceased personal guarantor to act as personal guarantors who have waived their privileges. The author agrees that the judges' considerations are correct, but are incomplete in considering matters regarding the transition of rights and obligations upon personal guarantee agreements both from Andi Sutanto to Bankruptcy Petitionee II and from Gunawan Sutanto to the Bankruptcy Petitionee III.

In Author's opinion, besides determining that the death of personal guarantor caused their heirs to act as personal guarantor, should the judges consider the responsibility of the heirs to the obligations of the deceased person in the field of wealth as well, based on inheritance legal system adopted by the heirs. Moreover Bankruptcy Petitionee II and Bankruptcy Petitionee III are subject to West Inheritance Law in which their responsibility for such matters is determined with their attitude toward the inheritance and each of attitude has a different legal consequences.

CONCLUSION

The legal consequence of a death of personal guarantor is transfer of personal guarantee agreement from personal guarantor to his heirs. It means that all the rights and obligations of personal guarantor upon personal guarantee agreement will not be vanished, but they will be passed to the heirs of the personal guarantor. In order to determine whether the heirs of personal guarantor may be filed with a bankruptcy petition, we shall consider their responsibility to the obligation left by former personal guarantor in the field of wealth, which then has to be considered based on the inheritance legal system in Indonesia and the inheritance legal system that is adopted by the heirs. In Indonesia. In the event of death of personal guarantor, the heirs of the personal guarantor who are subject to Islamic Inheritance Law, Adat Inheritance Law and West Inheritance Law, especially who accept the inheritance, will obtain responsibility upon personal guarantee agreement as personal guarantor and in return may face legal consequences as a personal guarantor, such as bankruptcy declaration against themselves. They may be filed for bankruptcy petition if they do not fulfill their obligations to creditors and they meet terms of the bankruptcy as stated in Article 2 paragraph (1) Indonesian

Bankruptcy Law. Meanwhile, the heirs of personal guarantor who are subject to West Inheritance Law, especially who refuse to accept the inheritance, will not obtain the rights and obligations of the personal guarantor upon personal guarantee agreement. Thus, they have no obligation to pay the debt of the debtor to the creditor when the debtor is in defaults, and in return, they cannot be filed with bankruptcy petition.

SUGGESTIONS

Suggestions based on this research are:

1. A person who is about to bind himself as a personal guarantor must apply the precautionary principle because personal guarantor has a huge legal consequences both to himself and to his heirs.
2. Heirs who are subject to West Inheritance Law must be careful in determining their attitude toward the inheritance left by the testator and should conduct an inventory of assets and liabilities of the testator in order to avoid the burden of inheritance that is too big for them
3. If creditors face the heirs of the personal guarantor who decline inheritance, creditors may file a bankruptcy petition against inheritance of debtor in order to get any loan repayment.

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